

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

| | | |
|--|----------|--------------------|
| IN THE MATTER OF APPLICATION FOR |) | |
| BENEFICIAL WATER USE PERMIT NO. 41H |) | FINAL ORDER |
| 30026244 BY UTILITY SOLUTIONS LLC |) | |

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on December 10 -11, 2007, in Bozeman, Montana, to determine whether a beneficial water use permit should be issued to Utility Solutions, LLC, hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

In order to expedite the hearing process the hearing in this matter was held concurrently with the hearing on Application to Change a Water Right No. 41H-30026245 which is the application to implement the augmentation portion of the Applicant's plan. With that in mind, a reviewer of the record in this matter should be alert that the witnesses and testimony, along with the exhibits, may at times be applicable to one or the other or both applications and the record must be viewed as considering both applications together.

APPEARANCES

Applicant Utility Solutions, LLC, appeared at the hearing by and through counsel, Matt Williams and Don MacIntyre. Marty Gagnon, Morrison-Maierle, Inc.; Michael Kaczmarek, Morrison Maierle, Inc.; Dr. Gerald Westesen; Richard Stenzel; Barbara Campbell; Dave Pruitt; Dr. Michael Nicklin; Milo Todd; Gerald Pacovsky; Pat Eller, Morrison-Maierle were called and provided testimony on behalf of the Applicant.

Objector's Paul Shennum, Sandra McManus, West Gallatin Canal Co., Bill and Kay Ballenger, Christy Fullen, Charles Brodie, Montana River Action Network, Roselee Faust and George Metcalfe [hereafter Objector Group] appeared at the hearing by and through counsel Hertha Lund. Joe Gutkowski, Montana River Action Network; Paul Shennum; Roselee Faust; Charles Brody; Dick Bernardinis; Lee Rozaklis; and George Alberda were called and provided testimony on behalf of the Objector Group.

Russell Levens, Department of Natural Resources and Conservation (DNRC) Hydrogeologist and Staff Expert, Scott Compton, DNRC Bozeman Regional Manager,

and Jan Mack, DNRC Bozeman Region Water Resources Specialist, were called to testify by the Objector Group.

EXHIBITS

Both Applicant and Objector Group offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Parties prefiled prepared direct expert testimony. Except when evidentiary objections are sustained, prefiled exhibits (filed with direct testimony) will be part of the record.

The Applicant offered and the Hearing Examiner admitted the following pre-filed testimony and exhibits:

Pre-Filed Direct Testimony of Dick Stenzel

Pre-Filed Direct Testimony of Michael B. Kaczmarek

Pre-Filed Direct Testimony of Dr. Michael Nicklin

Exhibit A-1N – A map titled “Locations with Transmissivity Data Vicinity of Four Corners.”

Exhibit A-2N – A map and cross-section titled “Geologic Map and Conceptual Cross Section Vicinity of Utility Solutions LLC Project.”

Exhibit A-3N - Two maps titled “Model Domain and Boundary Conditions Two Dimensional Simulation Model Utility Solutions, LLC.”

Exhibit A-4N – A table titled “Model Input Assumptions Gallatin Heights.”

Exhibit A-5N – A table and charts titled “Baseline Stream Depletion – Simulated Reach Combined Permits No. 41H-30012025, No. 41H-30013629 and No. 41H-30019215.”

Exhibit A-6N – A table and charts titled “Stream Depletion – Simulated Reach (including current application) Permits No. 41H-30012025, No. 41H-30013629, No. 41H-30019125 and Application No. 41H 30026244.”

Exhibit A-7N – A table titled “Net Simulated Change Associated with Existing Application.”

Pre-Filed Direct Testimony of Marty Gagnon

Exhibit A-1G – A plat titled “Preliminary Plat Gallatin Heights Subdivision.”

Exhibit A-2G – One page showing Total Average Water Demand for the Service Area.

Exhibit A-3G – A map titled “Utility Solutions, LLC Public Water Supply System – Place of Use Exhibit” (with a notation by the Hearing Examiner stating ‘erroneous DAV see A-11G)

Exhibit A-4G – A Technical Memorandum from Dwight W. Kimsey and Patricia K. Flood, P.E. to Kenneth R. Wright, P.E.; Chief Engineer regarding “Domestic Consumptive Use” dated December 31, 1987 consisting of 16 pages.

Exhibit A-5G – A document titled “Gallatin Heights Consumptive Use Calculations” consisting of 2 pages.

Exhibit A-6G – One page titled “Summary of Consumptive Use Under Permit Application No. 41H-30026244.”

Exhibit A-7G – A map titled “Utility Solutions, LLC Public Water Supply System – Water Trunk Main Layout Exhibit.”

Exhibit A-8G – A map titled “Utility Solutions, LLC Public Wastewater System – Sewer Trunk Main Layout Exhibit.”

Exhibit A-9G – A map titled “Utility Solutions, LLC Service Area – Flowmeter Location Exhibit.”

Exhibit A-10G – A letter from Sam J. Martinez, MDEQ to Eric Blanksma, P.E. regarding “EQ 07-2738, Utility Solutions, Service Area 5, Phase 1, Water & Sewer Main Extensions, and Two Sewage Lift Stations, Gallatin County, MT.” dated August 23, 2007, consisting of 2 pages.

At hearing the Applicant offered and the Hearing Examiner admitted:

Exhibit A-11G – A map titled “Utility Solutions, LLC Public Water Supply System – Place of Use Exhibit.”

Exhibit A-8N – A two page document titled “Gaining Stream or Losing Stream? Aquifer Recharge Gives Same Result.”

The Objector Group offered and the Hearing Examiner admitted the following pre-filed testimony and exhibits:

Pre Filed Direct Testimony of Lee Rozaklis (The Rozaklis testimony and exhibits were pre filed twice – first on October 31, 2007 (meeting the schedule deadline) and again with minor modifications of December 6, 2007 (late filed). At the hearing the Examiner asked counsel for the Applicant if there were any objections to the late filed testimony. Without objection, the late filed testimony is the version accepted by the Hearing Examiner.)

Exhibit O-A – The *curriculum vitae* of Lee Rozaklis

Exhibit O-B – A table titled “Summary of Water Requirements for Gallatin Heights Subdivision”

Exhibit O-C – A table and chart titled “Accretions/Depletions from Utility Solutions’ Proposal Under 41H-30026244, Including Augmentation and Changes of Water Rights as Proposed in Application No. 41H-30026245”

Exhibit O-D – A table titled “Major Assumptions in Historical Irrigation Use Water Budget Analysis”

At hearing the Objector Group offered and the Hearing Examiner admitted:

Exhibit O-E – A map titled “Bozeman – Belgrade – Four Corners ‘Triangle’ Area.”

The Hearing Examiner, at hearing, and without objection, took administrative notice of all previous Departmental Orders filed in Utility Solutions’ Applications For Beneficial Water Use Permits and Applications to Change a Water Right – specifically Application Nos. 41H-30019125, 41H-30021139, 41H-30023457, 41H-30014080, 41H-30017376, 41H-30012025, 41H-30013629, and the testimony of Dr. Michael B. Kazmarek in those applications.

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 41H-30026244 in the name of Utility Solutions, LLC, and signed by Trevor Campbell, was filed with the Department on January 26, 2007. (Department file)
2. A public notice describing facts pertinent to this application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation on May 17, 2007, and was mailed to persons listed in the Department file on May 16, 2007. (Department file)
3. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. In the EA at Part II, No. 2, on Page 6 of 7, Secondary and Cumulative impacts on the physical environment and human population have been addressed. (Department file)
4. Applicant seeks to appropriate 103.6 acre-feet of ground water per year to service the Gallatin Heights subdivision. The ground water is to be diverted from one or more of nine wells (six production wells and three backup wells) located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 11, Township 2 South, Range 4 East, Gallatin County, Montana. The proposed use is

municipal use. It does not include any irrigation. The proposed place of use is the Gallatin Heights Subdivision located in the E½ of Section 6, T1S, R4E; and portions of the E1/2NE1/4 and W1/2SW1/4, Sec. 6, T2S, R5E; the E1/2NE1/4 and portions of the NW1/4NW1/4, Sec. 7, T2S, R4E; portions of the E1/2, Sec. 12, T2S, R4E; portions of Sec. 11, T2S, R4E; and portions of N1/2 and SE1/4, Sec. 14 T2S, R4E, all in Gallatin County, Montana. The water system includes a previously approved 750,000 gallon water storage tank located in the NE¼NW¼SE¼ of Section 11, Township 2 South, Range 4 East, and a 500,000 gallon storage tank located in the SW1/4SE1/4NE1/4 of Sec. 12, T2S, R4E, Gallatin County, Montana. The proposed period of diversion and period of use is January 1 through December 31, inclusive, of each year. (Department file, Exhibit A-11G)

5. The nine wells proposed to be used are existing wells and have an approved combined flow rate of 1,273 gallons per minute. This application does not seek to increase the flow rate from the wells but would allow those wells to pump an additional 103.6 acre feet per year to supply water to the service area described.

Physical Availability

6. Applicant intends to appropriate water from the Quaternary alluvial aquifer system by the proposed wells at depths of less than 70 feet. Applicant's expert used thirteen aquifer tests of wells in the source aquifer and Tertiary aquifer to measure the hydraulic properties of the aquifer that control the rate of flow through the aquifer and the yield of the aquifer to the wells, and digital modeling simulations of the aquifer response to diversions through well fields to opine that an additional 103.6 acre-feet/year (at flow rates within the 1273 gpm currently approved) is physically available for the proposed use from the Quaternary alluvium at depths less than 80 feet below ground surface. Applicant evaluated the physical availability of water from Utility Solutions' previously approved applications 41H-30012025 and 41H-30013629 plus application 41H-30023457 (subsequently denied). Applicant's expert evaluated thirteen aquifer tests conducted in the alluvial aquifer at the sites of Applicant's proposed wells, including tests of 410 gpm for 72 hours, 560 gpm for 24 hours, 425 gpm for 24 hours, another 425 gpm for 24 hours, 500 gpm for 72 hours, 450 gpm for 24 hours, 375 gpm for 48 hours, and another 500 gpm for 24 hours; and two wells in the Tertiary aquifer at depths greater than 70 feet, including tests from wells 475 and 520 feet deep. (Department file, testimony of Mike Kaczmarek)

7. Applicant estimated the area of potential impact and estimated the amount of water flowing through that area. The area of potential impact to groundwater users is the zone of influence that would result from the Applicant's wells pumping for 365 days. That zone of influence includes the area resulting in a 1.0 foot drawdown. That zone of influence is supported by the Applicant's expert testimony and evidence. The area of potential impact to surface water users is the area (or segment of stream) that would be affected by a depletion to stream flow as a result of the consumption of 5.18 acre-feet per year of water. That area was identified by Applicant's groundwater modeling expert using the MODFLO model. Using MODFLO the area (segment of stream) where the depletion will occur is generally in the reach 3 miles south and 4 miles north of Norris Road. Applicant's expert used sound hydrologic principles and aquifer pumping test results to determine aquifer characteristics and estimate that 9360 acre-feet per year is available in the Quaternary alluvial aquifer in the area affected by Applicant's wells. Applicant is seeking an additional 103.6 acre-feet per year of water. No evidence was presented to contradict that water is physically available. The requested amount of water is physically available. (Department file, testimony of Mike Kaczmarek)

Legal Availability

8. Applicant has provided an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed points of diversion with the existing legal demands on the supply of water. Applicant's expert determined the area of potential impact from the proposed pumping by this Application and Applicant's previous applications. Applicant's expert used sound hydrologic principles and aquifer pumping test results to determine aquifer characteristics and estimate that 9360 acre-feet per year is available in the Quaternary alluvial aquifer in the zone of influence of the Applicant's wells. Applicant's expert then estimated the legal demands within that area to be 1731 acre-feet per year, including the water requested under this Application based on a review of the Department's records in the area of influence. Applicant's expert has calculated drawdowns for annual operation of the proposed well fields at a collective rate of 1275 gpm up to 788.48 acre-feet per year, and provided his professional opinion that the predicted drawdown was not large enough to adversely affect any of the existing wells or prevent their use under the rights claimed. No expert analysis was presented to contradict that the requested water is legally available. The amount of water physically

available exceeds the existing legal demands within the area of potential impact by approximately 7629 acre-feet per year. Water in the requested amount for the period of diversion is legally available. (Department file, testimony of Mike Kaczmarek)

9. Applicant calculates that 5.18 acre-feet of water per year will be consumed and depleted from the West Gallatin River under this Application. Applicant proposes to address the depletions from the West Gallatin through the augmentation plan discussed infra under “Adverse Effect.” Based on the specific plan of augmentation discussed below the Department finds that water in the requested amount for the period of diversion is legally available. (Department file, testimony of Mike Kaczmarek)

Adverse Effect

10. Applicant’s multifaceted plan for the exercise of the proposed permit that demonstrates that the Applicant’s use of the water will be controlled so the water right of a prior appropriator will be satisfied includes: 1) to treat and return water diverted but not consumed to the aquifer through a Rapid Infiltration (RI) basin located in the SW¼NE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County, Montana, and 2) to meter flows from each well into the tank and all releases from the storage tank, and water delivered to each user. In addition, Applicant plans to retire irrigated acres of land and put the water historically consumed under those (two) water rights into an augmentation gallery located in the NE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County, Montana, to offset the 5.18 acre-feet of water consumed by this use. See Application to Change a Water Right No. 41H-30026245. To assure Applicant’s plan accomplishes its goals, Applicant must: 1) meter all water diverted from ground water at each well, meter flows from each well into the storage tanks and all releases from the storage tanks, all water delivered to each user, all treated water diverted to the RI Basin, and all water diverted to the augmentation gallery; and 2) treat and return non-consumed water to the aquifer. (Department file, testimony of Marty Gagnon, testimony of Dick Stenzel)

11. Under Applicant’s plan, the amount of water consumed equals the depletion to the ground water aquifer (and the West Gallatin River). Here, consumption is defined to mean the amount of depletion, i.e., the difference between the water pumped and the water that is subsequently returned to the aquifer after water has been delivered to meet the proposed use. Applicant’s experts estimate the amount of water consumed by the Applicant’s proposed use (i.e., no irrigation) would be no more than 2%. Two percent is

a conservative estimate for this purpose. However, to avoid any issue that may otherwise arise under this Application attendant to this consumption, Applicant elected to assign a 5% loss instead of 2%. (Testimony of Richard Stenzel, Marty Gagnon)

12. Applicant's projected depletion of the West Gallatin River, that is, what will be consumed, by this Application is 3.2 gpm up to 5.18 acre-feet over the course of a year at full build out. These amounts are not measurable in the flow of the West Gallatin River, however, using a ground water model they are calculable. These amounts were calculated by Dr. Nicklin using a ground water model (MODFLO). Model inputs were transmissivity (16,283 ft²/d) from data collected and analyzed by Applicant's consultant Morrison & Maierle, specific yield value (0.20) which is more indicative of an alluvial aquifer's porosity when dealing with long-term pumping as is the case here, boundary conditions, and Rapid Infiltration basin recharge rates assuming a 5% rate of consumption. Applicant's expert projected depletions to the West Gallatin River for Applicant's present and previous applications¹ to be 59.7 gpm up to 96.46 acre-feet (i.e., including the 3.2 gpm up to 5.18 acre-feet for this Application) over a year's time at full build out. The modeled depletions would occur in the reach of the West Gallatin River generally 3 miles south and 4 miles north of Norris Road. Ranges of porosity for alluvial aquifers typically range between 0.25 to 0.40. Dr. Nicklin used 0.2 so that he did not under-predict the potential consequences of the well field on the West Gallatin River. (Department file, testimony of Dr. Nicklin, Marty Gagnon, Exhibit A-6N)

13. Based upon Dr. Nicklin's model, Applicant plans to augment area ground water by retiring additional West Gallatin River irrigation water rights via Application to Change a Water Right No. 41H-30026245. Applicant's augmentation plan uses an augmentation gallery to place the irrigation water into the aquifer during its historic period of diversion to offset projected depletions, in amount, timing, and location to the West Gallatin River. See Application to Change a Water Right No. 41H-30026245. The West Gallatin River is connected to the area ground water. Applicant's augmentation plan will offset any depletions from the West Gallatin River made over the course of a year at the time and in the location the depletions will occur. Applicant's proposed use must be conditioned on receipt of an approved augmentation plan to offset at least the 3.2 gpm up to 5.18

¹ Because the difference between the pumping rates and the recharge at the RI basin is only 6 gpm, Dr. Nicklin had to combine the flow from the current Application with that of beneficial water use permits issued pursuant to Application Nos. 41H 30012025, 41H 30013629, 41H 30019215 and the current application to obtain enough discharge to provide a meaningful solution in his model.

acre-feet per year impact to the West Gallatin River to prevent adverse effect to surface water users. Any future changes to the approved augmentation plan can only be allowed if the aquifer recharge amount and location is not altered, and must be approved by DNRC in a change proceeding prior to any change taking place. (Department file, testimony of Dr. Nicklin)

14. Applicant used average values of aquifer characteristics to predict aquifer drawdown in the vicinity of the wells. The greatest amount of drawdown interference that is predicted by the new appropriation on neighboring wells is less than 0.6 feet. The ground water wells within the potential area of impact will not be adversely affected because there is an adequate water column above the bottom of the saturated thickness of the alluvial aquifer to accommodate drawdown interference caused by the Applicant's pumping. (Department file, testimony of Mike Kaczmarek)

15. Applicant will require the subdivisions construct a water distribution system and institute subdivision covenants that do not allow cross-connection with this proposed system and the water system to be used for irrigation within the proposed place of use. (Testimony of Marty Gagnon)

Adequacy of Appropriation Works

16. Water will be diverted from the aquifer via up to nine wells which will pump to the two water storage tanks. Under this Application the wells will be operated one or more wells at a time, but collectively (under all Utility Solutions' permits) at no more than 1273 gpm. From the water storage tanks, water is pumped through a booster station into a water distribution system constructed throughout the Black Bull Run, Middle Creek Parklands and Gallatin Heights subdivisions. This water distribution system supplies water to each individual homeowner, the golf course clubhouse and restaurant, and for fire suppression. The intended purposes are designed and constructed as a single integrated system for the pumping and delivery of water to homes and businesses. The pumps, wells, pipelines, distribution and treatment system for the public water supply system, and the operation are extensively regulated by the Montana Department of Environmental Quality (Montana DEQ). The water system and wastewater system have been designed by professional engineers. Montana DEQ has approved the public water supply system, wastewater system, and all of their components. Applicant has installed two storage tanks to receive water from the wells and allow pumping from the wells during times of off-peak demand. The proposed wells, pumps, distribution and

treatments system are reasonable and customary for their intended purposes. No evidence was submitted to contradict the propriety of Applicant's proposed construction. The means of diversion, construction, and operation of the appropriation works are adequate. The appropriation works are adequate. (Department file, testimony of Marty Gagnon)

Beneficial Use

17. Applicant proposes to use water for a municipal purpose to provide water to residential lots in the Gallatin Heights subdivision, the associated places of use and for fire protection. No water has been requested for irrigation purposes. The irrigation component of the water supply will come from the subdivision developers, and not from this Applicant. Montana DEQ Circulars (design standards used by DEQ to regulate the design of public water and sewer facilities) were used to estimate the amount of water needed for the proposed uses within the subdivision. The Gallatin Heights subdivision will have 342 residential lots, minor commercial use, and require 103.6 acre-feet per year. Estimates do not include water for fire suppression. Water demands were based on the uses within the Subdivisions' boundaries as estimated by Applicant's engineer using DEQ Circulars, assumptions generally used by the engineering community, and conversations with the Subdivision engineers. If someone outside the Subdivisions requests water from the Applicant, the Applicant will seek additional amounts through appropriate applications to the Department as needed for these requirements as they become necessary. Objector Group's expert opines that the most reasonable estimate of the annual volumetric water requirement for the intended uses set forth in this application is approximately 62.25 acre-feet per year. Objector Group's expert believes Applicant has overestimated the per capita water use factors by using the DEQ guidelines for estimating waste water flows instead of considering occupancy rates and evidence from studies of actual domestic use rates in its calculations. While Objector Group's expert did estimate a lower amount of water could serve the domestic and commercial needs, he did not show that the amount of water requested by the Applicant was incorrectly estimated or is a waste of water. Based on the Department's rulings in previous Utility Solutions permits (i.e. 41H-30019215) estimating the water use based upon the DEQ Circulars is reasonable. The volume of water requested is the amount necessary for the proposed purpose. (Department file, testimony of Marty Gagnon, testimony of Lee Rozaklis)

18. No new flow rate is requested under this application. The existing pumps will only operate for a longer period of time, within their approved flow rates, to supply the 103.6 acre-feet per year required under this application. The proposed water system will incorporate a 500,000 gallon water storage tank and a 750,000 gallon water storage tank which will provide water during times of peak demand when water is being used at rates higher than the average day demand. During the peak demands, water will be removed from storage and when the peak demand subsides the tank will be refilled at the flow rates previously approved. The existing approved flow rate and the volume requested is the amount necessary for the proposed use as designed by Applicant's professional engineer. (Department file, testimony of Marty Gagnon)

Possessory Interest

19. Applicant has the possessory interest, or the written consent of the owners of Gallatin Heights subdivision and the other associated places of use. Ultimately, Applicant will have consent prior to supplying water to a landowner because Applicant will not supply water to any landowner without the landowner subscribing to the service, which is by its nature, consent. Applicant has possessory interest in the proposed place of use. (Department file, testimony of Marty Gagnon)

Water Quality Issues

20. No valid water quality objections were received on this application.

Basin Closure Issues

21. The definition reinstated by the Court in Lohmeier provides that "Municipal use" means water appropriated by and provided for those in and around a municipality or an unincorporated town." Admin. R. M. 36.12.101(39). Applicant admits that it is not a municipality. The proposed use, however, is for high density domestic use, golf course clubhouse and restaurant, and fire suppression which are of the type normally found in a municipal use. After the Lohmeier decision and after the hearing held in this matter, DNRC made a determination that "... Utility Solutions applications propose to provide water to subdivisions that will be completely or partially within or adjacent to the unincorporated town of Four Corners. Additionally, these applications can also be considered to be in and around a municipality (the City of Bozeman) or an unincorporated town (Four Corners). For these reasons, the Department finds that Utility Solutions, LLC's applications for municipal use appropriations to supply water under 30017376 for Service Area #2, 30023457 for Galactic Park, 30024735 for Elk Grove and **30026244 for**

Gallatin Heights and associated parcels may go forward under the definition of municipal use reinstated by Judge McCarter's March 26, 2007 decision." (emphasis added). These similar applications are in the same area, by the same applicant, and for much the same purposes as are permits to appropriate water by and for those in and around a municipality or an unincorporated town and qualify under the reinstated rule defining a municipal use. That determination cannot be distinguished factually from this matter other than the subdivisions include additional names and the application numbers are different. Gallatin Heights and the associated parcels are clearly adjacent to the unincorporated town of Four Corners. I find no evidence in this record which was not available to the Department when it made its June 15, 2007 determination regarding this Applicant and water use in Black Bull Run and Middle Creek Parklands subdivisions. The use proposed in this Application qualifies under the reinstated Mont. Admin. Rule 36.12.102(39) (Department file, testimony of Marty Gagnon).

22. The DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri River basin. The "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). The proposed wells are located in the Gallatin Valley which is within the Upper Missouri River basin closure area. There are exceptions to this closure for applications for permits to appropriate water for domestic, municipal, or stock use. This appropriation is by and for those in and around a municipality or an unincorporated town, and qualifies as a municipal use. Mont. Code Ann. §85-2-343(2)(c) and §85-2-342. This Application is for municipal use. (Department file, testimony of Marty Gagnon).

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. This Application was filed on January 26, 2007. The applicable law in this matter is the statutes and rules and regulations that were in effect on that date.
2. Objector Group and Applicant each filed a Post-Hearing brief. Objector Group lists three issues of law: 1) The Application does not meet the 311 criteria; 2) Utility

Solutions does not qualify for an exception to the Basin Closure Law and 3) The DNRC rules on augmentation do apply to this Application.

3. **Is Applicant entitled to a municipal use exemption from the Basin Closure Law?** The answer to this questions is yes. This question has previously been addressed by the Department and as quoted from the Final Order In the Matter of Application for Beneficial Water Use Permit No. 41H-30019215 by Utility Solutions LLC:

Objector Group argues that Applicant is not a municipality or any other quasi-public body, and its claim that it is entitled to a “municipal use” exemption is contrary to the Legislature’s intent for a plain language construction and is not supported by Montana law. Objector Group argues that municipal use is not defined in the Basin Closure Law; the Applicant is a private entity engaged in the subdivision and development of land for profit in the Four Corners area of Gallatin County; and that Mont. Code Ann. § 85-2-227(4) cannot be relied upon to support the conclusion that municipal use can include a private entity that operates a public water system because Mont. Code Ann. § 85-2-227(4) only addresses the abandonment of municipal water rights and not new appropriations; and application of arguments offered with earlier applications do not work here because this place of use is outside the Four Corners Water and Sewer District boundary (unlike the earlier places of use in Applicant’s previous permit). In addition, Objector Group points out that this Application was filed when DNRC’s administrative rule in ARM 36.12.101(39) definition of the term “municipal use” was in effect. That rule was later repealed by DNRC, but the validity of that action has been challenged by some of the Objectors in a Declaratory Judgment action which reinstated the rule . See, Lohmeier et.al v. DNRC, Cause No. ADV-2006-454. Objector Group’s arguments lead them to conclude that calling this type of use a municipal use has created a gaping hole in the Basin Closure Law [Mont. Code Ann. §§ 85-2-342, -343]. Objector Group concludes that these applications are not exempt from the Basin Closure Law and should not have been processed by DNRC.

Prior to reinstatement of the rule in Lohmeier, Applicant argued that DNRC must follow its own adjudications in which DNRC determined that municipal uses are simply not confined to cities and towns, and it is arbitrary and capricious to do otherwise. See In the Matter of Beneficial Water Use Application Nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC., Final Order November 9, 2006. Applicant argued that the focus of municipal use should be on the character of the use itself. DNRC has consistently confirmed municipal uses where the appropriator is neither a city or a town. In addition, Applicant argued that the Subdivisions that are the subject of this Application have petitioned to be annexed into the Four Corners Water and Sewer District. However, if they are not annexed, Utility Solutions, LLC, intends to supply the homeowners and businesses within the place of use under tariffs approved by the Public Service Commission. Applicant acknowledged that it has dedicated part of its system to public use; the PSC has accepted jurisdiction and authority over so much of the Utility Solutions, LLC, service that includes Elk Grove Subdivision. After the reinstatement of the rule, Applicant argues its use is a municipal use because the proposed use will be appropriated and used by those around the municipality of Bozeman; it will be appropriated and used by those in and around the

unincorporated town of Four Corners; and it will be appropriated by and provided for those within a place of use exhibiting all the criteria of an unincorporated town. Applicant cites Pollard v. Montana Liquor Control Board (1942), 114 Mont. 44, 131 P.974 as judicial support for its argument that the US service area is an unincorporated town.

The DNRC cannot process or grant an application for a permit to appropriate water within the Upper Missouri River basin until the final decrees have been issued in accordance with Mont. Code Ann. Title 85, Chapter 2, Part 2 for all of the subbasins of the Upper Missouri River basin. The “Upper Missouri River basin” means the drainage area of the Missouri River and its tributaries above Morony Dam. Mont. Code Ann. §85-2-342(4). However, applications for beneficial water use permits to appropriate water for domestic, municipal, or stock use, i.e., exceptions to the closure, can be processed prior to issuance of final decrees for all the subbasins of the Upper Missouri River basin. See Mont. Code Ann. §§85-2-342, 343(2)(c). See Finding of Fact No. 22. Objector Group argues that this Applicant cannot appropriate water for a municipal use because it is not a municipality or unincorporated town and the place of use is not within the Four Corners Water and Sewer District (distinguishing it from earlier DNRC Orders). The Objector Group relies on Mont. Admin. R. 36.12.101(39), reinstated March 26, 2007, which defines municipal use. They further argue that DNRC has not issued permits to a non municipality or unincorporated town within a basin closure area in the past. They cite Lohmeier regarding the meaning of “municipal use” as used in the basin closure Mont. Code Ann. §85-2-343(2)(c). However, Lohmeier does not define the terms within the reinstated definition as Objector Group argues – it merely reinstates the rule and says it is an accurate expression of the legislative intent behind the Upper Missouri River basin closure. The Department has found there is little if any controversy as to what comprises a municipality. However, it is not possible to expressly delineate what is an “unincorporated town” and what is “around it” with the same precision possible with municipalities.

The intended purposes of this Application are designed and constructed as a single integrated system for the pumping and delivery of water to homes and businesses in and about the unincorporated Four Corners area and for fire protection within the Utility Solutions, LLC, service area. A person may not appropriate water except as provided in the Montana Water Use Act, and may appropriate water only for a beneficial use. See Mont. Code Ann. § 85-2-301. A “person” means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or **any other entity**. (emphasis added) Mont. Code Ann. § 85-2-102(14) (emphasis added). By this definition and the finding of the Department in its June 15, 2007, Memorandum, the Applicant is a person who can appropriate water for a beneficial use. The proposed use is a municipal use according to applicable law, past DNRC permitting decisions and according to the description of the use. See Finding of Fact Nos. 21, 22.

No evidence was presented to contradict the Department’s June 15, 2007, determination that the proposed uses for Black Bull Run and Middle Creek Parklands are a municipal use. Objector Group contested the Hearing Examiner’s officially noticed materials stating it is improper to take notice at this stage in the proceeding. Objector Group did not argue that the documents in question were not a proper subject for official notice. Objector Group did

specifically voice exception to the notice of the 1995 State Banking Board decision and finds it notable that the attorney for the requesting bank in that proceeding (Big Sky Western Bank) is a partial owner of one of the developments seeking water through this current proceeding. Official notice of the document was taken because of the determination made in 1995 regarding the standing of the Four Corners area and not because counsel of one of those parties has apparently invested in the Four Corners area. I do not find the exception to notice of this document sufficient to exclude it. DNRC's determination that these Applications are for municipal use allows processing of the beneficial water use permit applications. Mont. Code Ann. §§§ 85-2-102(14); 85-2-301; 85-2-342, 343.

See also Proposal for Decision Application 41H-30012025 & 41H-30013629 by Utility Solutions LLC.

The instant application is for the Gallatin Heights Subdivision and various other lands in the Utility Solutions' service area. These are all part of a comprehensive development plan by Utility Solutions, utilize the same infrastructure and are integrated components of Utility Solutions' development plan. (Finding of Fact Nos. 4, 5, 16, 18)

4. Do the DNRC rules on augmentation as they existed at the time of application apply to this application? The answer to this question is also yes, and the Department has previously ruled that an application in the Upper Missouri River Basin closure area must have an augmentation plan to offset any depletions to stream flow. This is so whether the augmentation plan is "for the purposes of offsetting any adverse affect that would otherwise accrue to senior appropriators within the meaning of MCA 85-2-311" or "augmentation where such exchanges are necessary in order to comply with basin closure provisions." See Applicant's Post-Hearing Brief @ 8. While augmentation is not the beneficial use applied for under *this* application, Change of Use Application No. 41H-30026245 is inextricably intertwined Application No. 41H-30026244 and the augmentation beneficial use there under (or some other means of offsetting the stream depletion) must be approved in order for this application to be approved.

Objector Group, in essence, argues there is not an augmentation plan in the state of Montana. Objector Group argues that augmentation is not allowed by statute in a closed basin. Augmentation is not foreign to the laws of Montana. See Mont. Code Ann. § 85-2-337(3). See e.g., In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation, Proposed Terms And Conditions, Final Order (2001). Augmentation is a water use tool in Montana. This Hearing Examiner disagrees with argument of Objector Faust that augmentation is not allowed in this closed basin (i.e., changes are not allowed in a basin

which has been closed to protect existing appropriators). The statutes closing the basin, Mont. Code Ann. §§ 85-2-342 and -343, address only the permitting of new water rights and allow exceptions to the closure. These statutes do not in anyway address changes pursuant to Mont. Code Ann. §85-2-402. Likewise, there is nothing in Mont. Code Ann. §85-2-402 which prohibits changes in closed basins. Moreover, if changes are not allowed (as Objectors suggest), I fail to see how **any** permit application for an exempt use such as domestic or stock (for example) could be allowed through an exemption. If there is no water for new uses (i.e., the reason the basin was closed), and changes of existing rights are not allowed in a closed basin, then all water right activity except for the process allowed in Mont. Code Ann. § 85-2-306, would presumably stop under this argument. The Legislature apparently contemplated that new uses could be allowed, and in fact foresaw that changes to existing water rights would need to occur to allow flexibility including for a new appropriator to offset effects of the new use – the Legislature did not prohibit changes to existing rights in the closure legislation. Mont. Code Ann. § 85-2-343(1). (Finding of Fact Nos. 4, 5, 16, Conclusion of Law No. 1)

5. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of the evidence. (Mont. Code Ann. §85-2-311(1))

6. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially

in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. (Mont. Code Ann. §85-2-311 (1) (a) through (h))

7. A public notice containing the facts pertinent to the permit application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. Proper notice has been made. Mont. Code Ann. §85-2-307. (Finding of Fact No. 2)

8. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. §85-2-311(1)(a)(i). (Finding of Fact Nos. 6,7)

9. The Applicant has proven that water can reasonably be considered legally available in the amount and during the period of requested appropriation. Objectors presented little evidence to show water is not legally available. An Objector stated that wells in the area had gone dry, but offered no evidence to support the statement, including causation or identification of specific wells. Applicant has shown that sufficient unappropriated water will be physically available at the points of diversion to supply the amount requested throughout the period of appropriation. (Mont. Code Ann. §85-2-311(1)(a)(ii), Finding of Fact No. 8, 9)

10. The Applicant has proven that the water rights of prior (ground or surface water) appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected when conditioned to assure Applicant's plan accomplishes its goals. Applicant must: 1) require a water distribution system and/or subdivision covenants that do not allow cross-connection of the permitted water uses with the irrigation water system used to irrigate within the proposed place of use, 2) treat and return non-consumed water to the aquifer; 3) assure that water treated at the waste water treatment plant and discharged into the Rapid Infiltration basin disposal beds is not used further; 4) meter all water diverted from ground water at each well, all water diverted from each well into the tanks and all releases from the storage tanks to this place of use, all water delivered to each user, all treated water diverted to the Rapid Infiltration basin, and all water diverted to the augmentation gallery; and 5) obtain a DNRC approved change authorization or otherwise find a reliable source of water to implement their augmentation plan to offset the 5.18 acre-feet per year impact to the West Gallatin River in the reach of the West Gallatin River generally 3 miles south and 4

miles north of Norris Road over the course of a year. See Application to Change a Water Right No. 41H-30026245. Diversion under this Application may not commence until the augmentation is implemented. Diversion under this Application must stop if augmentation as herein required in amount, location and duration ceases. Nothing in this decision approves, by implication or otherwise, the granting of any applications for permits or changes other than those in the caption to this proceeding.

Applicant's plan to assure the water rights of prior appropriators will not be adversely affected is to change water rights that have been historically used for irrigation to an "augmentation" purpose in order to make up for the consumptive portion of the proposed new use.

Mont. Code Ann. §85-2-311 states that DNRC shall issue a permit if an applicant for beneficial water use permit proves by a preponderance of evidence that certain criteria, here adverse affect, are met. It may be necessary for an applicant to make use of new technology or specialized equipment to meet one or more of the criteria. If an application is dependent on special management, technology or measurement to ensure there will be no adverse affect to other water users DNRC can and routinely does, condition a new permit's use on use of that special management, technology or measurement. See Mont. Code Ann. § 85-2-312. There is no indication in the sections of the Montana Water Use Act that govern the new water use permitting process (Mont. Code Ann. § 85-2-301, *et seq.*) that a plan of augmentation, either by replacement of water in a source of supply through a change in use of an existing water right or by other means, is prohibited as a way to preclude adverse affect. See, e.g., In the Matter of Beneficial Water Use Permit Application No. 41H 30012025 by Utility Solutions, LLC, Final Order (2006); In the Matter of Beneficial Water Use Permit Application No. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods, Final Order (2000) (augmentation Upper Missouri River Basin); Mont. Code Ann. §85-2-413. In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation, DNRC Final Order (2001); In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC., Change Abstract (2003)(application had no objections; allows water under claim 76g 32356 to be exchanged for water appropriated out-of-priority by the permits at the wet closures and wildlife ponds to offset consumption arising at the wet closures and wildlife ponds with the priority date of claim 76G 32356.); In The Matter of Designation of the Larsen Creek

Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order (1988)(requires augmentation); State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed); *Order After Remand of Petition for Judicial Review* (2007), Faust et al. v. DNRC et al., Cause No. BDV-2005-443, Montana First Judicial District Court, Lewis and Clark County; see also Final Order, *In the Matter of Application to Change Water Right No. 41H 3001480 By Utility Solutions LLC and Zoot Properties LLC* (December 21, 2006), *appeal pending*, Faust et al v. DNRC et al., First Judicial District Cause No. CDV-2007-47; Final Order, *In the Matter of Application No. 41H 30021139 To Change Water Right Nos. 41H 12231-00 And 41H-12232-00 By Utility Solutions LLC* (July 24, 2007), *appeal pending*, Faust et al v. DNRC et al., First Judicial District Cause No. CDV-2007-602.

Montana case law also provides a history of augmentation, including augmentation by new or untried methods. See Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587. Augmentation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho). Here, Applicant's plan is to augment flows in the West Gallatin River to mitigate any impacts that would have an effect on a prior appropriator, and not to augment out of the basin closure statute. Mont. Code Ann. §85-2-311(1)(b). (Findings of Fact Nos. 10, 11, 12, 13, 14)

11. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). (Finding of Fact No. 16)

12. The Applicant has proven the proposed use of water is a beneficial use of water for which Applicant can establish a water right under a permit. The flow rate and volume of water requested is the amount necessary for the proposed purpose. Mont. Code Ann. §85-2-311(1)(d). (Finding of Fact Nos. 18, 18)

13. The Applicant has proven a possessory interest in the property where water is to be put to beneficial use. Applicant has met the requirements of Mont. Admin. R. 36.12.1802(1)(b) because the proposal is for municipal use. Mont. Code Ann. §85-2-311(1)(e). (Finding of Fact No. 19)

14. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. (*Montana Power Co. v. Carey*, (1984) 211 Mont. 91, 96, 685 P.2d 336, 339)

15. Applicant has met the criteria for issuance of a permit when conditions are applied. (Mont. Code Ann. §85-2-312)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Application for Beneficial Water Use Permit 41H-30026244 is **GRANTED** to Utility Solutions, LLC, to appropriate up to 1273 gallons per minute (gpm) up to 103.6 acre-feet of ground water per year. The ground water is diverted from nine wells located in the E $\frac{1}{2}$ of Section 6, T1S, R4E; and portions of the E1/2NE1/4 and W1/2SW1/4, Sec. 6, T2S, R5E; the E1/2NE1/4 and portions of the NW1/4NW1/4, Sec. 7, T2S, R4E; portions of the E1/2, Sec. 12, T2S, R4E; portions of Sec. 11, T2S, R4E; and portions of N1/2 and SE1/4, Sec. 14 T2S, R4E, all in Gallatin County, Montana. The purpose is municipal use. **No water under this permit shall be utilized for the irrigation of the above described lands.** The place of use is the Gallatin Heights Subdivision and associated lands located in the E $\frac{1}{2}$ and SW $\frac{1}{4}$ of Section 6, and N $\frac{1}{2}$ and W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7, all in Township 2 South, Range 5 East; and in the E $\frac{1}{2}$ E $\frac{1}{2}$ of Section 12, Township 2 South, Range 4 East, all in Gallatin County, Montana. The water system incorporates an existing 500,000 gallon water storage tank located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 2 South, Range 4 East, Gallatin County, Montana and an existing 750,000 gallon storage tank located in NE1/4NW1/4SE1/4 of Section 11, Township 2 South, Range 4 East, Gallatin County Montana. The period of diversion and period of use is January 1 through December 31, inclusive, of each year.

A. Permittee shall require a water distribution system and/or subdivision covenants that do not allow cross-connection of the permitted water uses with the irrigation water system used to irrigate within the proposed place of use.

B. All water not consumed by the proposed use must be treated at the waste water treatment plant and discharged to the Rapid Infiltration basin disposal beds after the use

provided for herein, and the Permittee shall not further divert or use such return flows under the rights provided for in the Permit.

C. Permittee shall obtain DNRC's approval for any change in the method of disposal of non-consumed water. Any change in disposal method must return at a minimum the amount of water historically returned to the aquifer through the Rapid Infiltration basin under this Application.

D. Permittee shall install or cause to be installed meters to record the flow rates and volumetric amounts of all water diverted from ground water at each well, all water diverted from each well into the storage tanks and all releases from the storage tanks to this place of use, all water delivered to each user, all treated water diverted to the Rapid Infiltration basin, and all water diverted to the augmentation gallery. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all water diverted at each measuring device including the period of time, and shall submit the record by October 15th of each year and upon request at other times during the year. Failure to submit records may be cause for revocation of a permit. The records must be submitted to the Bozeman DNRC Water Resources Regional Office. The appropriator shall maintain the measuring devices so they always operate properly and measure flow rate and volume accurately.

E. Permittee's use of water under this Permit is conditioned upon augmentation to offset the at least the 5.18 acre-feet per year impact to the West Gallatin River generally in the reach 3 miles south and 4 miles north of Norris Road over the course of a year. Diversion under this Permit may not commence until the augmentation as specifically described in this decision, i.e. Application to Change a Water Right No. 41H-30026245, is approved and implemented. Diversion under this Application must stop if augmentation as herein required in amount, location and duration ceases. Diversion under this Permit must stop if any part of the required augmentation ceases.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 25th day of July 2008.

/Original signed by David A Vogler/

David A. Vogler
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 25th day of July 2008 by first-class United States mail.

MATTHEW WILLIAMS
WILLIAMS & JENT
506 E. BABCOCK
BOZEMAN MT 59715

DONALD MACINTYRE
ATTORNEY AT LAW
307 N JACKSON ST
HELENA, MT 59601-5009

HERTHA LUND
ARTHUR WITTICH
WITTICH LAW FIRM
602 FERGUSON AVE, SUITE 5
BOZEMAN, MT 59718

Cc:
RUSSELL LEVENS – **Hand Delivered**
PO BOX 201601
HELENA, MT 59620-1601

DNRC, BOZEMAN REGIONAL OFFICE
2273 BOOT HILL CT STE 110
BOZEMAN, MT 59715

/Original signed by Jamie Price/
Jamie Price, Hearings Assistant
Hearings Unit, (406) 444-6615